TABLE OF CONTENTS

TABLE OF CITATIONS - Page 1

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

Ferdinand Buckley moves the Court for leave to file a brief annexed hereto as Amicus Curiae. Appellees Arthur K. Bolton, as Attorney General of the State of Georgia and Lewis R. Slaton, as District Attorney of Fulton County, Georgia, have consented to the filing of the proposed brief. The Appellants, and Herbert T. Jenkins, as Chief of Police of the City of Atlanta, Georgia, have refused to consent to the filing of the attached brief.

By order of Judge Sidney O. Smith, Jr., dated April 25, 1970, Ferdinand Buckley was appointed guardian ad litem of the unborn child of Mary Doe. On May 5, 1970, Judge Smith passed an order revoking the appointment of Ferdinand Buckley as guardian ad litem and granted Ferdinand Buckley leave to participate in the case only as amicus curiae, which he did, filing briefs and taking part in oral argument. Subsequently, Ferdinand Buckley duly filed a motion for reconsideration of said order of May 5, 1970, and also filed a motion for leave to intervene in behalf of the unborn child of Mary Doe and on behalf of all unborn children in the State of Georgia who might be affected by a judgment in the action. Both of these motions were overruled in the Court's opinion of July 31, 1970, but were not expressly passed upon in the Court's judgment of August 25, 1970. Ferdinand Buckley therefore filed on September 3, 1970, a motion to alter or amend said judgment of August 25, 1970. By order of October 13, 1970, the Court expressly overruled Ferdinand Buckley's motion for reconsideration of the order of May 5, 1970, revoking his appointment as guardian ad litem and also overruling his motion to intervene in behalf of the unborn child of

Mary Doe and other unborn children in the State of Georgia.

After Judge Smith appointed said guardian ad litem of the unborn child of Mary Doe, and before Judge Smith passed his order of May 5, 1970, revoking said appointment, the guardian ad litem filed an answer and counterclaim in behalf of said unborn child. In said counterclaim, the guardian ad litem averred that plaintiffs had conspired to deprive the unborn child of Mary Doe of life in violation of the legal rights of said unborn child secured to him by the United States Constitution, the Georgia Constitution of 1945, and Title 42, Sections 1981, 1985 and 1988 of the United States Code. Said unborn child of Mary Doe prayed for an injunction against plaintiffs depriving him of said rights as provided by Title 42, Section 1983, of the United States Code.

A Notice of Precautionary Appeal from the judgment of the United States District Court for the Northern District of Georgia entered on August 24, 1970, was filed on behalf of said unborn child with the United States Court of Appeals for the Fifth Circuit on September 18, 1970.

A motion for leave to appeal in forma pauperis was also filed in behalf of the unborn children.

On July 12, 1971, the United States District Court entered an order (Appendix A) refusing to permit the appeal in forma pauperis by Ferdinand Buckley as next friend of the unborn child of Mary Doe and other unborn children in the State of Georgia, but expressly authorizing an appeal in forma pauperis by Ferdinand Buckley in his own name.

Amicus, as next friend of the unborn child of Mary Doe and of all unborn children similarly situated in the State of Georgia, sought to appeal the judgment of the United States District Court to the Supreme Court of the United States. By order dated May 3, 1971, said appeal was dismissed for want of jurisdiction.

SUMMARY OF ARGUMENT

The unborn child of Mary Doe is a "person" and as such is entitled to protection under 42 USCA, §§ 1983 and 1985, as well as under the Fourth, Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments of the United States Constitution.

The fundamental right to life of the unborn child must be protected against arbitrary extinguishment. For such extinguishment without benefit of his rights being considered is an absolute denial of due process and equal protection of the law.

INTEREST ON AMICUS

The interest of the Amicus is to present certain arguments to this Court with the sole objective of preserving the life of the unborn child of Mary Doe as well as the lives of all other unborn children in the State of Georgia similarly situated.

While it is true that the Attorney General of the State of Georgia has sought to preserve the life of the unborn child of Mary Doe, he has done so only within the context of upholding the constitutionality of the Georgia Abortion Statute now under attack. Also, the primary objective of the remaining appellees, District Attorney of

Fulton County, Georgia, and the Chief of Police of Atlanta, is merely to demonstrate that neither is now prosecuting or threatening to prosecute Mary Doe or any of the other plaintiffs in the case below for any violation of the Georgia Abortion Statute in question. Most assuredly, Appellants are not interested in preserving the life of said unborn but in fact are dedicated to its destruction.

Therefore, since none of the parties hereto have as their sole objective the preservation of the life of the unborn child of Mary Doe and other unborn children, it becomes of paramount importance for this Court to conside the arguments advanced on behalf of the unborn child by this amicus curiae who has actively participated in every phase of the subject case.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 70-40

MARY DOE, ET AL., [1]

Appellants

against

ARTHUR K. BOLTON, as Attorney General of the State of Georgia; LEWIS R. SLATON, as District Attorney of Fulton County, Georgia; and HERBERT T. JENKINS, as Chief of Police of the City of Atlanta, Georgia,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF OF FERDINAND BUCKLEY, AMICUS CURIAE IN SUPPORT OF APPELLEES

1/ Appellants, whose names do not appear on the caption are: PETER G. BOURNE; ROBERT HATCHER; LILLAS L. JAMES; JAMES WATERS; CORBETT TURNER; NEWTON LONG; EDWARD LEADER; WILLIAM H. BIGGERS; GEORGE VIOLIN; PATRICIA S.

(continued on next page)

INTRODUCTORY STATEMENT

The facts of record in this case, the pertinent Georgia statute, and the opinion of the court below are found in the briefs of the parties of record. The District Court's opinion is officially reported at 319 Fed. Sup. 1048 (D.C. N.D. Ga. 1970). This Amicus accepts said statements of fact for purposes of this brief.

INTEREST OF AMICUS AND HIS POSITION IN THE CASE

1. Interest of the Amicus. The Amicus is a member of the Bar of the State of Georgia, the United States District Court for the Northern District of Georgia, and of this Court The Amicus was appointed guardian ad litem for the unborn child of Mary Doe by order of the court below of April 25, 1970. That order was revoked by order of the lower court of May 5, 1970, which expressly permitted the Amicus to continue to appear as Amicus Curiae in behalf of the unborn child of Mary Doe and other unborn children similarly situated in Georgia in all further proceedings in the court below.

This Amicus feels that as a member of the Bar who has participated and spoken in the proceedings below in behalf of the unborn child

---

SMITH; JENNIE WILLIAMS; JUDITH BOURNE; SUZANNE DUNAWAY; JOYCE PARKS; LOU ANN IRION; MARY LONG; J. EMMETT HERNDON; SAMUEL L. WILLIAMS; EUGENE PICKETT; RICHARD DEVOR; DONALD DAUGHTRY; JUDITH ZORACH and KAREN WEAVER; RESIDENTS OF THE STATE OF GEORGIA; PLANNED PARENTHOOD ASSOCIATION OF ATLANTA, INC., a GEORGIA CORPORATION, and GEORGIA CITIZENS FOR HOSPITAL ABORTION, INC., a GEORGIA CORPORATION,

(continued on next page)

of Mary Doe and other unborn children in the State of Georgia similarly situated he has a continuing obligation to assert the rights of unborn children with reference to this appeal.

2. The position of the Amicus on the issues. This Amicus supports the position of appellee Arthur K. Bolton, as Attorney General of the State of Georgia, that the Georgia statute in question is constitutional. However, this Amicus also asserts that an unborn child of a pregnant woman seeking an abortion in the State of Georgia not only has rights which are protected under the statutes and Constitutions of the United States and the State of Georgia, but also has a right to appear as a party by guardian ad litem or next friend in any legal proceeding in which those rights are put in issue.

3. Question presented. This Amicus submits that the determinative question presented by this appeal is whether or not the unborn child of a pregnant woman seeking an abortion in the State of Georgia is, from the moment of conception, a person within the meaning of the United States Constitution and that of the State of Georgia so as to be entitled to enjoy all constitutional rights, privileges and immunities conferred on a person by the United States Constitution and the Constitution of the State of Georgia. This Amicus contends that that question must be answered in the affirmative.

FOR AND ON BEHALF OF ALL PERSONS AND ORGANIZATIONS SIMILARLY SITUATED.

ARGUMENT

The Declaration of Independence provides, inter alia, that ". . . all men are created equal, that they are endowed by their creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." At what point in time does an unborn child become a human being endowed with fundamental rights which are protected by our Federal and State Constitution? Logically, if men are created equal and are endowed with unalienable rights by their creator, it would seem to follow that they are endowed with these rights at the time of their initial creation.

There is no question that in Georgia a person is endowed with his legal rights from the moment of conception. Both the Georgia Supreme Court and the Georgia legislature have recognized this principal. The Supreme Court of Georgia has stated clearly that the right of a child to be secure in his person commences with his conception. Hornbuckle, b/n/f v. Plantation Pipeline Co., 212 Ga.504, 93 S.E. 2d 727. Cf., Tucker v. Carmichael & Sons, Inc., 208 Ga. 201, 65 S.E.2d 909. The principle of the Hornbuckle case was recognized by the legislature in the provisions of Ga. Code § 26-1202 (c) giving a right of action for declaratory or injunctive relief in behalf of an unborn child.

In order to determine at what point in time an unborn child becomes a "person" entitled to protection under 42 USCA, §§ 1983 and 1985, as well as under the Fourth, Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments of the United States Constitution, the Federal Court should look to Georgia law. Brazier v. Cherry, 293 F.2d 401 (USCA 5th,

1961). In this regard, Georgia law is clear. The unborn child's rights begin at conception.

There is no basis in logic or justice either to an unborn child or to society-at-large for the law to protect the property of an unborn child, but to refuse to protect the very person of such unborn. Tucker v. Carmichael & Sons, Inc., supra. Moreover, the vast majority of courts which have passed upon the question within the last twenty years have recognized the right of an unborn child to be secure in its person, at least from the time it is "quick". See "Prenatal Injury As Ground Of Action," 27 A.L.R. 2d 1256, and "Action For Death Of Unborn Child," 15 A.L.R. 3d 992.

It has been held in Georgia that the negligence of a mother of an unborn child could not be imputed to the unborn child so as to affect the right of such child to recover damages for injuries inflicted upon him by a negligent third party. Fallaw v. Hobbs, 113 Ga. App. 181, 147 S.E.2d 517. It follows that this recognition by the Georgia Court of Appeals of the fact that an unborn child is a person with legal rights separate and distinct from those of his mother is based on the premise that the rights of the mother are not paramount but must be considered in conjunction with the right of the unborn child to life. Raleigh Fitkin-Paul Morgan Mem. Hosp. v. Anderson, 201 A. 2d 537 (1964).

The law of Georgia manifests a particular concern for children, born and unborn. For example, Ga. Code § 74-9903 prohibits the abandonment of an unborn child, and Ga. Code § 74-105 prohibits the abandonment of the child after birth. Also, Ga. Code § 74-111 requires every physician in this State who has reason to believe that physical injury was inflicted

upon a child by a parent to make a report of such findings. See also Ga. Code § 74-109 permitting the Ordinary to appoint a guardian for a child who is subject to cruel treatment by his parents; Ga. Code § 26-2801 making it a crime for one who has custody of a child under the age of eighteen years of age to deprive him of necessary sustenance or to maliciously cause the child excessive physical or mental pain; Ga. Code § 88-1716 requiring a registration of all fetal deaths.

In seeking to balance the conflicting interests of mother and child, the Supreme Court of New Jersey in the case of Raleigh Fitkin-Paul Morgan Mem. Hosp. vs. Anderson, supra, was concerned with an action by a hospital seeking authority to administer blood transfusions to a pregnant woman who did not wish to have same for the reason that they were contrary to her religious conviction as a Jehovah's Witness. The Court stated, at page 438:

> "We are satisfied that the unborn child is entitled to the law's protection and that an appropriate order should be made to insure blood transfusions to the mother in the event they are necessary in the opinion of the physician in charge at the time."

The United States Supreme Court denied certiorari in 377 U.S. 985 (1964).

Similarly, in Wagner vs. Finch, 413 F.2d 267 (CA 5th) (1969), it was held that the illegitimate child of a deceased father, conceived before, but born after, the father's death, was sufficiently in being to be capable of living with the father at the time of

his death so as to qualify said child for benefits under the Social Security Act. Thus, the unborn child was "in being" so as to be entitled to the law's protection.

Thus, we see that the child in his mother's womb has legal rights which are entitled to protection in the State of Georgia as well as in most, if not all, of the states of this country. And, as already seen, the unborn child is a "person" for many legal purposes, and the Fourteenth Amendment expressly provides that no state shall "deprive any person of life . . . without due process of law."

In this case the appellants assert various assorted alleged rights of privacy as a basis for their attack upon the constitutionality of the Georgia statute under consideration. Opposed to those alleged rights is the unborn child's fundamental right to life itself.

In Price vs. Commonwealth of Massachusetts, 321 U.S. 158, 64 S. Ct. 784 (1944), this Court recognized that a State may act as parens patriae in behalf of a child to protect the child from his own parent. The Court stated, at 321 U.S. 166:

> "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the State can neither supply nor hinder . . . and it is in recognition of this that these decisions have respected the private realm of family life which the State cannot enter. But the family itself is not beyond regulation in the public interest, as against a claim of

> religious liberty. (Citation omitted). And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interests in youth's well-being, the State as parens patriae may restrict the parents' control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways. Its authority is not nullified merely because a parent grounds his claim to control the child's course of conduct on religion or conscience. Thus, he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death."

. While the Constitution prohibits the deprivation of liberty without due process of law, "The Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has a history and connotation. But the liberty safeguarded is a liberty in a social organization which requires the protection of law against the evils which meance the health, safety, morals, and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process." Wesco Hotel Co. vs. Parrish, 300 U.S. 379, 391 (1937). See also Zemel vs. Rusk, 381 U.S. 1, 14 (1965); Edwards vs. People of State of Calif., 314

U.S. 160 (1941); and Roth vs. United States, 354 U.S. 476 (1957).

> "The basic problem is not whether a court in exercising the power of judicial review may pass judgment on legislative acts, but rather how wisely it exercises this power in identifying, appraising and weighin the competing interests.", Prof. Paul G. Kauper: "Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold case", 64 Mich. Law Review 235, 257, 258.

In "A Survey of Social Interests," 57 Harvard Law Review 1 (1943), Dean Roscoe Pound stated much the same proposition thusly:

> "Looked at functionally, the law is an attempt to satisfy, to reconcile, to harmonize, to adjust these overlapping and often conflicting claims and demands either through securing them directly and immediately, or through securing certain individual interests, or through delimitations or compromises of individual interest, so as to give effect to the greatest total interests or to the interests that weigh most in our civilization, with the least sacrifice of the scheme of interests as a whole."

So we see that the General Assembly of Georgia was confronted with the various conflicting interests which surround and are intertwined with the interests on the one hand of the pregnant woman and her health and self preservation of the life of the unborn child. The General Assembly provided certain

circumstances under which an abortion might be performed, and prohibited all other abortions. The General Assembly further provided that any Solicitor General (now District Attorney) in a Judicial Circuit in which an abortion is to be performed under the Georgia Abortion Act, or any person who would be a relative of the child within the second degree of consanguinity, may petition the Superior Court of the county in which the abortion is to be performed for a declaratory judgment as to whether the performance of such an abortion would violate any constitutional or other legal rights of the fetus. The General Assembly further provided that if the Court determined that such an abortion would violate the constitutional or other legal rights of the fetus, the Court should so declare and should restrain the physician from performing the abortion. The General Assembly of Georgia did that which it was required to do; it provided a procedure for raising and asserting the constitutional rights of the unborn child.

The appellees have vigorously sought to uphold the constitutionality of the Georgia statute. However, without in any way diminishing the splendid efforts of the appellees, we believe that it is only fair to state that the primary objective of the appellees is to uphold the constitutionality of the Georgia abortion statute and to assert that the appellees in their respective official capacities are violating no constitutional rights of the appellants.

On the other hand, the sole objective of this Amicus is to preserve the life of the unborn child of Mary Doe and the lives of other unborn children in the State of Georgia similarly situated, whether or not the Georgia abortion statute in question can meet

constitutional requirements.

Speaking of the Fourteenth Amendment, Mr. Justice Thurgood Marshall once said:

> "This self-executing language is, however, deceiving. Its positive form does not guarantee automatic enforcement. The courts, naturally enough, exercise the power in cases brought before them to decree when the rights guaranteed by the amendment have been infringed. But these rights cannot be enforced unless those who possess them know they exist and are given the legal means to vindicate them. Without the commitment of the bar, those protected by the amendment will ordinarily possess neither the knowledge nor the skills needed to make the promises of the amendment meaningful. Without the commitment of large numbers of lawyers, of 'private attorneys-general' if you will the amendment will mean nothing.
>
> "Ironically enough, this basic point about the role of the judiciary was made pointedly by one of the Justices concurring in the Dred Scott decision, the decision reversed by the combined force of a civil war and the fourteenth amendment itself. In deciding Dred Scott, Mr. Justice Wayne declared: '[T]he court neither sought nor made the case.' And so today, under far different concepts of right and justice, the courts still cannot 'make' cases. They must be brought by litigants, well-informed of their rights, through lawyers dedicated to the principles

which lie behind that great amendment." 3 Ga. Law Review 1, 3 (1968).

* * *

"Today, the legislatures, the courts the bar, and the people of this country are demonstrating a concern for fairness and justice unparalleled in the history of our nation. Can we say that the fight has been won? Can we rest upon our past accomplishments? If we do, we have not learned well the lessons of the past one hundred years. We have not learned that constant vigilance is necessary to maintain justice and freedom. We have not learned that solemn declarations and victories have a way of fading in the face of other national concerns. We have not learned that inequality and injustice are complex, pervading cancers. The framers of the fourteenth amendment thought a solemn declaration would forever solve the problem of social injustice. As they were wrong, we would be wrong in assuming that the victories of the last decade will establish and maintain that goal. Vigilance is necessary to prevent backsliding. But more important are the goals of the future. They are many and diverse--they are familiar to you--meaningful compliance with the legacy of Brown, effective counsel and defense for the criminally accused, and perhaps most important, the need for 'legal power' on the side of the socially and economically depressed. These are your goals. It is your job as future

lawyers, future judges, future legislators, and as legal educators to see that the nation's concerns for justice through law does not again go the way of the fourteenth amendment. For if you do not seek these goals, the nation that depends upon you for leadership will soon forget the lessons of the past one hundred years. Elihu Root spoke to the point in 1904. His words still hold true: 'The lawyer's profession demands of him something more than the ordinary public service of citizenship. He has a duty to the law. In the cause of peace and order and human rights against all injustice and wrong, he is the advocate of all men, present and to come.'" Id. at 9, 10.

CONCLUSION

This Court should recognize the fundamental right of the unborn child to life, and the responsibility of the State to protect the life of the unborn child. It is this fundamental right to life of the unborn child of Mary Doe and of all unborn children similarly situated which should be recognized and protected by this Court. This Court should further recognize that the unborn child has a right to be heard through a guardian ad litem or next friend in any action in which his right to life is in issue.

We therefore respectfully submit that the judgment of the court below should be reversed, and the court below should be instructed to enter an order dismissing the

plaintiffs' complaint.

Respectfully submitted.

Ferdinand Buckley

James A. Eichelberger

Hugh Robinson, Jr.

Attorneys for Amicus

CERTIFICATE OF SERVICE

This is to certify that I am of Counsel of Record for Amicus Curiae Ferdinand Buckley and have this day served one copy of the Brief of said Amicus on each of the following persons:

Dorothy T. Beasley
Assistant Attorney General
132 State Judicial Building
40 Capitol Square
Atlanta, Georgia 30334

Margie Pitts Hames
210 Brighton Road, N.E.
Atlanta, Georgia 30309

Tony Hight
Assistant District Attorney
Atlanta Judicial Circuit
136 Pryor Street, S.W.
Atlanta, Georgia

Henry L. Bowden
Ralph H. Witt
2614 First National Bank Building
Atlanta, Georgia 30303

by depositing a copy of same, addressed as above with postage prepaid in the United States Mail, before filing.

This 13th day of October, 1971.

Hugh Robinson, Jr.

APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARY DOE, et al.,	:	
	:	
Plaintiff	:	
	:	CIVIL ACTION
vs.	:	
	:	
ARTHUR K. BOLTON, as Attorney General of the State of Georgia LEWIS R. SLATON, as District Attorney of Fulton County, Georgia, and HERBERT T. JENKINS, as Chief of Police of the City of Atlanta,	:	NUMBER 13676
	:	
Defendants	:	

In this case, Ferdinand Buckley was originally appointed as guardian ad litem for the unborn child of Mary Doe. Upon consideration by the court, the order of appointment was revoked. A motion was made to reconsider and/or to intervene on behalf of all unborn children who might be affected by the order, which was likewise denied. However, Mr. Buckley was invited and allowed to participate in the case as amicus curiae.

In the instant motion, Mr. Buckley seeks to appeal the court's orders denying his right to proceed as guardian ad litem or as intervener. In the present motion, he characterizes himself as "next friend" and "attorney of record" of the affected class. It is, of course, the court's desire that he be allowed to appeal

the court's previous orders and, under the circumstances, it is appropriate that it be done in forma pauperis. However, by such order, the court does not designate Mr. Buckley as "next friend" for the class or as "attorney of record" for such class nor confer any standing upon Mr. Buckley to represent the class, as such act would be inconsistent with the previous orders of the court.

Accordingly, the motion for leave to appeal in forma pauperis is granted to Mr. Ferdinand Buckley. Otherwise it is denied.

IT IS SO ORDERED.

This the 12th day of July, 1971.

Sidney O. Smith, Jr.
United States District Judge